FOR ARGUMENT.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1979

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

TIDEWATER MOTOR TRUCK ASSOCIATION, HOUFF TRANSFER, INC., and DOLPHIN FORWARDING, INC.,
Respondents,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, et al.,
Respondents.

REPLY BRIEF OF RESPONDENT TIDEWATER MOTOR TRUCK ASSOCIATION

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I. The Control Test Is Properly Before the Court.

The NYSA/CONASA Brief erroneously states that "[f]or the first time in the lengthy litigation involving the Rules on Containers the right of control test is invoked by the Board . . . The Board now seeks to rewrite its decisions in this case by retrospectively inserting a right of control analysis." (NYSA/CONASA Brief pp. 35-36). The ILA states that "[t]he Board has never before addressed this issue, much less found an absence of control." (ILA Brief p. 19). However, these parties stop short of explicitly asserting that the issue of the sea carriers' lack of control

over the use of containers by NVOCC's, consolidators, and trucking companies is not properly before this Court. There really can be no doubt that the control factor has been considered at every level of this litigation in determining the true unlawful secondary objective of the Rules. In his Decision and Recommended Order, adopted by the Board, Administrative Law Judge Wagman made repeated reference to the motor carriers' complete control of containers in their possession. (Bd. Petition pp. 149a-152a, 164a-165a). The Board stated in its Decision in *Associated Transport* that the administrative law judge's reliance upon the "'complete control' language of the full equipment interchange agreements" (Bd. Petition p. 165a) was among the criteria upon which he "correctly relied . . . in finding the violations in this proceeding." (Bd. Petition p. 115a). The right of control issue was briefed to the Court of Appeals by all parties. (*See* ILA Brief pp. 31-34; CONASA Brief p. 39, n. 29; Bd. Brief pp. 21, n. 12, 26-27; ILA Reply Brief pp. 4-6; CONASA Reply Brief pp. 17-21). NYSA and CONASA admit that both the Board and the Court of Appeals considered this issue (NYSA/CONASA Brief pp. 35-36), and it clearly passed on the issue on its merits. (Bd. Petition pp. 55a-57a).

The Board did not rest its decision principally upon the control factor, because it found that the work in controversy was not traditional longshore work. The question of who has the right to control the work does not become a determinative factor unless it is found that the disputed work was traditional work of the union claiming it. *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507 (1977). The control issue has taken on more importance because of the decision of the Court of Appeals that the Rules protect traditional ILA work. Therefore, in light of its decision in *Enterprise* and the record of the proceedings, this Court is not precluded from considering the importance

of control. *Bingham v. United States*, 296 U.S. 211, 218-219 (1935); *Pennsylvania v. Brown*, 373 F.2d 771, 777 (3rd Cir. 1967).

II. The Rules Apply to All Containers Regardless of Ownership.

In attempting to show the Rules have no secondary objective the ILA, CONASA and NYSA assert that the ILA does not claim the right to stuff and strip containers that are not the property of the sea carriers, and that this fact makes some legal difference. (NYSA/CONASA Brief p. 37; ILA Brief p. 29). The sea carriers blithely state that an arbitral principle established in 1963, requiring that containers owned by other than sea carrier employers are to be moved without restriction or stripping on the pier, is "now part of the industry's labor relations code." (CONASA/NYSA Brief p. 37, n. 37). Nevertheless these parties continue to apply the Rules to *all* containers regardless of ownership, and it is just happenstance that the fines levied against Associated and Houff involved containers owned by the sea carriers.

The preamble of the latest version of the Rules negotiated in 1975 states that the Rules on Containers "covers all container work at a waterfront facility . . ." (Bd. Brief p. 1a). The scope of Rule 1(a)(1) covers: "Containers owned, leased or *used by carriers* . . ." regardless of ownership. (Bd. Petition p. 69a, Emphasis added). Since the 1963 arbitration decision the ILA has enforced the clear language of the Rules against consolidators who attempted to use "foreign" containers which the sea carriers did not own and which did not carry the sea carriers' names. In *Consolidated Express, Inc.* the Board found that the ILA insisted that "even these [foreign] containers were stripped and restuffed by ILA labor at the piers." 221 N.L.R.B. at 959. Similarly, in *International Longshore-*

men's Ass'n (*Shipside Packing Co., Inc.*), 227 N.L.R.B. 659 (1976), the ILA refused to handle containers not owned by sea carriers and stuffed at off-pier facilities.

Petitioners contend that ownership of containers does not give the sea carriers the legal power to control their stripping and stuffing, the work at issue. (TMTA Brief pp. 54-64). Nevertheless, the continued enforcement of the Rules against the containers not "owned" by the sea carriers belies the ILA's assertion that the enforcement of the Rules is legitimately grounded on whatever control ownership gives the sea carriers. The secondary objective is proved by the very breadth of the Rules and their enforcement.

Respectfully submitted,

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